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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

United States of America

vs.

Jose Susumo Azano Matsura,

Case No. 14-cr-00388-MMA

**Nonparty Sempra Energy's Reply in  
Support of Motion to Quash Rule 17(c)  
Subpoena**

JUDGE: Hon. Barbara Lynn Major  
CTRM: 11th Floor (Carter/Keep)

**I. INTRODUCTION**

Defendant Jose Susumo Azano Matsura's opposition to nonparty Sempra Energy's Motion to Quash relies on a legal standard that is clearly inapt under controlling Ninth Circuit authority, and confirms the improper purposes and facially vague and ambiguous nature of his Rule 17(c) subpoena. The Court is respectfully requested to grant Sempra's Motion and quash the Subpoena.

**II. ARGUMENT**

**A. Mr. Azano Must Satisfy The *Nixon* Standard To Obtain Discovery**

Mr. Azano argues that the test set forth in *United States v. Nixon*, 418 U.S. 683 (1974), does not apply to Rule 17 subpoenas issued to nonparties. Opp. at 15–16. He is mistaken. The Ninth Circuit has expressly held that there is "no basis for using

1 a lesser evidentiary standard [than that set forth in *Nixon*] merely because production  
 2 is sought from a third party rather than from the prosecution." *United States v.*  
 3 *Fields*, 663 F.2d 880, 881 (9th Cir. 1981); *see United States v. Johnson*, 2014 WL  
 4 6068089, at \*2 (N.D. Cal. Nov. 13, 2014) ("This standard is the same whether the  
 5 subpoenaed party is the government or a third party.") (citing *Fields*). Mr. Azano  
 6 offers no explanation as to why this Court should ignore controlling appellate  
 7 authority and apply a different standard.

8 Indeed, the test Mr. Azano proposes "has very limited support and is a distinct  
 9 minority view." *United States v. Al-Amin*, 2013 WL 3865079, at \*8 (E.D. Tenn. July  
 10 25, 2013). "[C]ases from the overwhelming majority of courts," including the Ninth  
 11 Circuit, have applied *Nixon* to Rule 17 subpoenas issued to nonparties, and the "great  
 12 weight of authority favors applying the *Nixon* test" under these circumstances. *Id.*;  
 13 *see, e.g., Fields*, 663 F.2d at 881 (Ninth Circuit applying *Nixon* standard to subpoena  
 14 served on nonparty); *United States v. Eden*, 659 F.2d 1376, 1381 (9th Cir. 1981)  
 15 (same); *United States v. Reed*, 726 F.2d 570, 577 (9th Cir. 1984 (same); *United*  
 16 *States v. Villa*, 503 Fed. Appx. 487, 489 (9th Cir. 2012) (same); *United States v.*  
 17 *Green*, 857 F. Supp. 2d 1015, 1017 (S.D. Cal. 2012).

18 Accordingly, Mr. Azano's subpoena must be quashed unless he can  
 19 "demonstrate that the materials he seeks are (1) relevant; (2) admissible; and  
 20 (3) specific." *Nixon*, 418 U.S. at 700; *Green*, 857 F. Supp. 2d at 1017. He has failed  
 21 to do so.<sup>1</sup>

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 23  
 24 <sup>1</sup> Even if the alternative standard urged by Mr. Azano were applicable (which it is  
 25 not), the Subpoena should still be quashed. Mr. Azano argues (erroneously) that the  
 26 subpoena merely need be "(1) reasonable, construed using the general discovery  
 27 notion of material to the defense; and (2) not unduly oppressive for the producing  
 28 party to respond." Opp. at 16. As set forth herein, however, the materials Mr. Azano  
 seeks are *not* material to the defense, and the requests are vague, ambiguous and  
 overbroad. Accordingly, even under the incorrect standard advanced by Mr. Azano,  
 the Subpoena should be quashed. *See* Fed. R. Crim. P. 17(c)(2) (subpoena may be  
 quashed "if compliance would be unreasonable or oppressive").

**B. Mr. Azano Has Failed To Satisfy The *Nixon* Standard**

As set forth in Sempra's Motion, the District Court previously ruled in the context of a motion by Mr. Azano to compel discovery from the Government that the same categories of materials he now seeks from Sempra are "[i]mmaterial" and "irrelevant" to the case against Mr. Azano. [Doc. No. 103-1 at 3, 5–6 (quoting Doc. No. 58).] In his opposition, Mr. Azano attempts to distinguish this prior ruling by arguing that when he sought virtually identical materials from the Government, he did so for a different reason than that for which he now seeks the same materials from Sempra. Specifically, Mr. Azano argues that he sought the materials from the Government in connection with potential *defenses*, and now seeks the same materials from Sempra to support an argument "that the wiretap evidence in this case should be suppressed[.]" Opp. at 1.<sup>2</sup> This "distinction" fails and simply confirms that Mr. Azano is attempting to use this Rule 17(c) subpoena for improper purposes.

**1. The Subpoena Does Not Seek Documents Relevant To A Suppression Motion**

To succeed on his motion to suppress wiretap evidence, Mr. Azano must prove: "(i) the evidence was unlawfully intercepted; (ii) the order of authorization under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." *See* 18 U.S.C. § 2518(10)(a); *United States v. Roybal*, 46 F. Supp. 3d 1127, 1149 (D.N.M. 2014). In considering whether to grant such a motion, "a judge is typically ***limited to the information that the United States submitted to the judge*** who issued the wiretap order." *Roybal*, 46 F. Supp. 3d at 1149 (emphasis added).

Documents in the possession of a private third party such as Sempra are irrelevant to this determination, and Mr. Azano cites no authority to the contrary. Indeed, Mr. Azano does not cite any authority *at all* for the proposition that a court

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<sup>2</sup> Sempra cannot access the only Motion to Suppress reflected on the docket, as it appears to have been filed under seal. [Doc. No. 110.]

1 can or should compel discovery from a non-governmental third party in deciding a  
 2 motion to suppress wiretap evidence. Moreover, even if such authority existed, Mr.  
 3 Azano's Subpoena is not limited to materials provided to the court that issued the  
 4 apparent wiretap authorizations in this case, or even to documents or information  
 5 possessed by or known to the Government when it sought the wiretap. Instead, the  
 6 Subpoena seeks a wide range documents in *Sempre's* possession, including materials  
 7 relating to "surveillance of Mr. Azano," and communications between Sempra and  
 8 governmental agencies regarding Mr. Azano. *See* Doc. No. 103-2 at 3. Such  
 9 materials are irrelevant to this case, much less to a motion to suppress.<sup>3</sup> The  
 10 Subpoena should be quashed for this reason alone.

11           2.     Requests 1 and 2 Should be Separately Quashed Because Mr.  
 12                     Azano Has Failed to Make the Showing of Specificity Required  
 13                     by *Nixon*

14           Even when a Rule 17(c) subpoena is directed to potentially relevant subject  
 15 matter (which is not the case here), it will still be quashed if the proponent fails to  
 16 make the strict specificity showing required by *Nixon*. *See United States v.*  
 17 *Ruedlinger*, 172 F.R.D. 453, 456 (D. Kan. 1997) ("Specificity is the hurdle on which  
 18 many subpoena requests stumble.") (citation omitted). Requests 1 and 2 in Mr.  
 19 Azano's Subpoena fall far short of that standard.

20           Rule 17 was "not intended to provide an additional means of discovery" for  
 21 defendants in criminal cases. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220  
 22 (1951). A defendant is thus not permitted to use a Rule 17(c) subpoena to engage in  
 23 a "fishing expedition" in the "hope that he manages to catch something." *United*  
 24 \_\_\_\_\_

25 <sup>3</sup> Mr. Azano argues that "to use Sempra's logic, Judge Anello has already ruled that  
 26 surveillance information must be produced under Rule 16." Opp. at 21. Not so. The  
 27 District Court ordered the Government to produce surveillance documents *in the*  
 28 *possession of the Government* [Doc. No. 58 at 3], which may of course be relevant in  
 connection with a motion to suppress, or for other reasons. By contrast, any  
 surveillance-related materials that may have been generated by and be in the  
 possession of *Sempre* are irrelevant to a motion to suppress, or any other issue in the  
 case against Mr. Azano, and the District Court has not ruled otherwise. Mot. at 7.

1 *States v. Larson*, 2014 WL 5696204, at \*5 (N.D. Cal. Nov. 4, 2014). Rather, "[t]he  
 2 specificity prong of the *Nixon* test requires Rule 17 subpoena requests to be  
 3 particularized and to identify *specific items or documents* that defendants believe in  
 4 good faith are in existence." *United States v. Lee*, 2009 WL 724042, at \*2 (N.D. Cal.  
 5 Mar. 18, 2009) (emphasis added) (citing *Nixon*, 418 U.S. at 700). This standard is  
 6 not satisfied "if the defendants do not know what the evidence consists of or what it  
 7 will show." *Id.*; see *United States v. W. Titanium, Inc.*, 2010 WL 4788551, at \*1  
 8 (S.D. Cal. Nov. 17, 2010) (quashing subpoena that was "not directed toward the  
 9 production of *specific evidentiary materials*") (emphasis added). Mr. Azano's  
 10 opposition confirms that he cannot make this showing.

11                   a.     *Request 1: Communications between Sempra and SDPD or*  
 12                                 *"any other law enforcement agency" or "any other*  
 13                                 *government agency regarding alleged criminal conduct by*  
 14                                 *Susumo Azano"*

15         Far from identifying specific evidentiary materials, as required by *Nixon*,  
 16 "Request 1" of Mr. Azano's Subpoena is not even limited to communications with  
 17 specific government agencies, during specific time periods, or as to specific topics  
 18 (other than the general topic of "alleged criminal conduct by Susumo Azano").  
 19 Remarkably, Mr. Azano nonetheless argues in his opposition that the request "could  
 20 not be more specific." Opp. at 20. This response borders on frivolous. Not only  
 21 *could* the request be more specific, it *must* be more specific. See *W. Titanium, Inc.*,  
 22 2010 WL 4788551, at \*1. Mr. Azano's response simply confirms that the request  
 23 reflects a fishing expedition—indeed, one directed to the same broad category of  
 24 materials that the District Court determined to be "irrelevant" and "immaterial" when  
 25 Mr. Azano sought them from the Government—and that it should therefore be  
 26 quashed. See *id.*; see also Fed. R. Crim. P. 17(c)(2) (court may quash subpoena  
 27 where compliance would be unreasonable or oppressive); *Johnson*, 2014 WL  
 28 6068089, at \*6.

b. *Request 2: "Materials or correspondence related to electronic or other surveillance of Mr. Azano"*

Mr. Azano has likewise failed to make the required showing of specificity with respect to "Request 2," which contains a similar shotgun-blast request for all "[m]aterials or correspondence" relating to any "electronic or other surveillance of Mr. Azano." As with Request 1, this request lacks any temporal limitation, any specificity as to occasion or purpose of the purported "surveillance," or any specificity as to the specific evidentiary material being sought (other than that it constitute "materials or correspondence"). In his opposition, Mr. Azano again confirms that this request is merely a fishing expedition, arguing that the requisite specificity is provided by the limitation as to "topic ('electronic or other surveillance of Mr. Azano') and the type of item ('materials or correspondence')." Opp. at 21. As with Request 1, this response fails to "identify specific items or documents."<sup>4</sup> See *Lee*, 2009 WL 724042, at \*2; *W. Titanium*, 2010 WL 4788551, at \*1. Accordingly, this broad, vague and ambiguous request fails to satisfy the specificity prong of *Nixon*, is unreasonable and unduly burdensome, and should therefore be quashed.

### III. CONCLUSION

Accordingly, the Court is respectfully requested to grant nonparty Sempra's Motion and to enter an order quashing Mr. Azano's May 26, 2015 Subpoena.

Dated: June 24, 2015

Respectfully submitted,

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By: /s/ Lee Linderman

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<sup>4</sup> Mr. Azano also argues that the Government "admitted" that materials described in Request 2 exist. Opp. at 21. Sempra has no knowledge of this supposed admission, which is irrelevant to the issue of whether the Subpoena meets the specificity standard required by *Nixon*.